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PETITION FOR A WRIT OF CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted] 1970

MELVIN WILLIS HARGRAVES
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

SACKS, SACKS & TAVSS
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Petitioner,

vs.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Melvin Willis Hargraves, your petitioner, prays that a writ of certiorari issue to review a final judgment of the Supreme Court of Appeals of Virginia entered on January 19, 1970.

OPINION BELOW

The opinion of the Court below is not reported as yet, but is appended hereto.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on January 19, 1970. The jurisdiction of this Court is invoked under Title 28 U S C Section 1257 (3).

QUESTIONS PRESENTED

1. Whether or not the police officers had probable cause to arrest and search petitioner without warrant where the arrest was based upon the uncorroborated "tip" of an anonymous informer.

2. Was the petitioner entitled to either the identity of the informer or specific information regarding past information he had given to the police.

STATUTES INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was arrested on June 27, 1968, while driving his automobile in the City of Norfolk, Virginia.

The arrest was made without a warrant. The officers, in their car, fell in behind petitioner's automobile, blew their siren and put on their red lights and pulled petitioner over.

Hargraves was told that he was under arrest for violation of Virginia narcotic laws and he was taken from the car and searched. Taken from his shirt pocket was a "brown piece of paper" like a piece of paper bag containing two capsules which were later identified as narcotics. The search of the automobile resulted in finding in the trunk a bottle cap, eye-dropper, and needle wrapped in white paper.

Officer R. H. Isaacs of the Norfolk Police Department, the arresting officer, who was accompanied by Officer Christmas at the time, testified that on the day of the arrest he had no information or intentions concerning Hargraves until approximately 2:00 o'clock P.M. the same day. At that time, in the presence of Officer Christmas, and at the police station, he received a telephone call from "an informer". He recognized the voice but declined to reveal his identity at trial and the Court ruled that the identity was not required to be revealed.

Over the objection of petitioner, Officer Isaacs was allowed to testify that he was told by the unidentified informer that Hargraves was going to one "Snookie's house to

get some heroin. The "informer" did not advise the police officer in the telephone conversation where he was at the time; he did not relate any of the circumstances as to how or why he knew the facts that he related; he was not questioned by Officer Isaacs as to where he had gotten his information nor was he asked how much of it he knew himself and how much of it was based on hearsay.

Although the informer did not state when the defendant was supposedly to do this act, Officer Isaacs testified that he "took it from there that he was going right then", so he began working on the situation immediately. Although Officer Isaacs, at the time of receiving the telephone call, was in the Detective Bureau of the Norfolk City Police Department and that there was a Justice of the Peace who had the power to issue arrest and search warrants right downstairs in the same building, he did not attempt to get a search warrant based on the information he had, nor did the fact that there were two police officers change this and Officer Isaacs did not attempt to have one of them obtain a search warrant and the other go to investigate the activities of the defendant.

Petitioner was arrested at approximately 2:30 P.M., on the same day; the officers had gone to the area of "Snookie's" house and had parked behind the Virginia National Bank where they could see the front of the premises, 806 Mariner Street. They observed the house with binoculars and waited there approximately five minutes when a woman came to the door and opened it. Approximately five minutes later, while the officers were watching, an automobile driven by Hargraves came up and stopped and Hargraves went into the house for a minute or so. When he came back out and got in his automobile and pulled off, the officers then proceeded to follow and arrest petitioner. Although Officer Isaacs, on

cross-examination, stated that he could not recall, it was established that on the very day of the arrest of the defendant, Hargraves, June 27, 1968, that Isaacs had sworn out a search warrant for the search of the premises, 806 Mariner Street. Officer Isaacs admitted, however, he executed an affidavit to obtain the search warrant that day to the effect that he had received information from a "reliable informant" who stated that he had purchased heroin from Snookie Westcott, who lived at 806 Mariner Street; that Snookie Westcott was a known narcotic drug peddler in the Norfolk area and had a brother named James Westcott living in Maryland; that James Westcott was a known supplier of drugs in the Norfolk area.

In spite of the fact that Officer Isaacs had executed the affidavit for a search of the premises, 806 Mariner Street, he did not execute the search warrant, did not enter or attempt to enter the Mariner Street premises, nor did he perform any search thereof. The search warrant apparently remained in his possession unexecuted. When asked why he did not execute the warrant, his explanation was, "I don't recall getting a search warrant". However, when confronted with the affidavit, (Exhibit D-1), he admitted its execution and his signature.

Isaacs agreed that petitioner had done nothing suspicious at any time on that day prior to his arrest until "we started to stop him". When pressed on cross-examination for facts supporting the alleged reliability of the informant, Officer Isaacs refused to give any information as to why he deemed the informant reliable, stated that:

> "If I say the information, I believe my informant will be exposed."

The only information the officer was willing to give and the only information the Trial Court required the officer to

give to test the reliability of the unidentified informant was that there was one case, unidentified, unidentified in any other manner, that occurred in 1968, in which the unidentified informant, through unexplained actions, earned the reputation of being reliable to Officer Isaacs. On this information, Isaacs testified he drove after Hargraves after Hargraves left Westcott's house. When Hargraves was stopped, he was arrested, and searched. The search revealed some narcotics, capsules and other implements.

These items of physical evidence were first analyzed and later introduced into evidence at the trial.

Petitioner was then indicted by the Grand Jury of the Corporation Court of the City of Norfolk for an alleged violation of Section 54-488 of the Code of Virginia, to-wit, possession of narcotics. The indictment, in essence alleged that such alleged violation was a second offense, defendant being charged in the indictment with having been convicted on November 20, 1951, in the United States District Court, at Norfolk, of the Harrison Narcotic Act.

Petitioner promptly and timely moved the Court to quash the indictment on the ground that the same was improper, prejudicial and that he should not be required to stand trial under those circumstances.

The Court overruled the motion to quash and defendant was tried by the Court, having waived a jury.

Petitioner further moved the Court to suppress certain evidence introduced by the Commonwealth, to-wit, certain capsules identified to contain narcotics and certain apparatus described as a "set of works".

The Court overruled the motion to suppress the evidence and admitted the same in the evidence.

At the conclusion of the evidence the Court found petitioner guilty of a violation of Section 54-488 and pursuant to the provisions of Section 54-416 of the Code of Virginia, sentenced him for a second offense to a term in the Virginia State Penitentiary of eight years and a fine of One Hundred ($100.00) Dollars.

Petitioner moved the Court to set aside the finding and sentence and to grant a new trial on the same grounds as previously offered in support of petitioner's motion to quash the indictment, and on his motion to suppress which motion was overruled and final judgment entered against defendant on August 25, 1969.

Petitioner then appealed to the Supreme Court of Appeals of Virginia, which Court without hearing, rejected the petition for appeal and refused a writ of error and supersedeas, the effect of which was to affirm the conviction of the Corporation Court of the City of Norfolk.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the case herein is controlled by this Court's decision in *Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584* (1969) and *Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509* (1964) and the decision of the Supreme Court of Appeals of Virginia is not in accord with said decisions.

ARGUMENT

1. ***Whether or not the police officers had probable cause to arrest and search petitioner without warrant where the arrest was based upon the uncorroborated "tip" of an anonymous informer.***

In this case, the evidence which convicted petitioner was obtained by a search incident to arrest. Two capsules of narcotics were obtained from petitioner's shirt pocket and a bottle cap, eye dropper and needle were found in a trunk of petitioner's car. Both the search of Hargraves and his car were performed without a warrant, but allegedly pursuant to the arrest of petitioner.

The Commonwealth relied on "probable cause" to justify the arrest. The probable cause as urged by the police officers is as follows: Officer R. H. Isaacs knew that Hargraves had been arrested for narcotics before; he had a record on him in his office and Isaacs had Hargraves' picture in his office. Tr. 39). Further, on the day of Hargraves' arrest, Isaacs received a phone call from an informant who, as Isaacs says, "told me on the telephone that 'Chicken' Hargraves was going to 'Snookie's' house to obtain or buy some heroin. I asked him, "Snookie Westcott". He said, 'Yes', I know this man, Westcott, where he lives and his home address and so forth". The informant, Isaacs stated, had been proven reliable in the past. The only specifics regarding the informant's reliability was that he had given reliable information one time in 1968.

On this basis, the Trial Court held that there was probable cause to arrest Hargraves. Petitioner contends that this information did not amount to probable cause.

In our argument we will cite cases dealing with the sufficiency of affidavits for the issuing of search warrants. It is respectfully submitted that the test for probable cause for arrest is at least as stringent as that for probable cause for many search warrants. See *Wong Sun v. United States, 371 U. S. 471 (1962).* As a matter of fact, the test may be even more stringent in cases of searches without warrants. See *Beck v. Ohio, 379 U.S. 89* (1964) at page 96.

> "An arrest without warrant by passes the safeguards provided for objective predetermination of probable cause and substitutes instead the far less reliable procedure of an after-the-fact justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight".

Aguilar v. Texas, 378. U. S. 108 (1964) set forth the so-called "two pronged" test. This case was recently further explained by *Spinelli v. United States, 393.U. S. 410* (1968). Petitioner submits that the action of the Trial Court, as approved by the Virginia Supreme Court of Appeals, is inconsistent with these decisions. A comparison of the present case with *Spinelli* will clearly show this.

In *Spinelli* the affidavit set forth the following grounds for the issuance of the warrant: (1) the government agents had been watching Spinelli's movements and had observed him leaving his home to go to the same apartment every day; (2) a check showed there were two telephones in that apartment; (3) Spinelli was a "known gambler", and (4) a tip from an informer told the agents that Spinelli was operating a bookmaking operation in that apartment.

This Court in dealing with the statement that Spinelli was a "known gambler", stated it was "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision". Thus in petitioner's case, Officer Isaacs' statement that Isaacs knew Hargraves' record for narcotics violation and his reputation for such, does not add anything to probable cause in this case. Both are the same thing, a conclusion or suspicion on the part of law enforcement officers. In petitioner's case it is only the "tip" that breathes life into the contention of probable cause by the Commonwealth of Virginia.

The affidavit in *Spinelli* failed the *Aguilar* test in two respects.

> "First, the application failed to set forth any of the underlying circumstances necessary to enable the magistrate independently to judge of the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant officers did not attempt to support their claim that their informant was 'credible' or his information 'reliable' ". *393 U.S. at p. 413*

In the present case the record is bare concerning the underlying facts upon which the informer relied. No explanation was given to show how the informant knew what he claimed to know.

As to the "reliability" of the informant, the only evidence produced showed that at one time in 1968 this informant gave Officer Isaacs information which led to an arrest. Defendant sought further information regarding the informer's "past performance", but was denied same by the Trial Court on objection by the Commonwealth.

Petitioner submits that in this case the Trial Court erred when the results of the officer's search were admitted. The petitioner was not granted an appeal by the Virginia Supreme Court of Appeals on the basis that there was "no reversible error in the judgment complained of".

Petitioner submits that, not only was he convicted on evidence seized in violation of his Fourth Amendment rights, but further that were a writ of certiorari granted in this case, this Court could set forth valuable guidelines for probable cause for arrest and consequent searches of defendants.

2. *Was the petitioner entitled to either the identity of the informer or specific information regarding past information he had given to the police?*

Inquiry was made by petitioner's counsel, at the trial of the case, as to the informant's identity. The Court sustained the objection of the Commonwealth. Further, when petitioner's counsel sought to know what information the informant had given Officer Isaacs before that led Isaacs to believe the informant was reliable; the Court refused to allow those questions. The only information given on cross-examination, regarding past information was in regard to one time in 1968. The Court refused to allow any further specificity other than *that* information was "very reliable".

In *Roviaro v. United States, 353 U. S. 53* (1956), this Court required the disclosure of the identity of an informer in a narcotics case. Such disclosures are not, at all, unknown. This Court, in the *Roviaro* case stated, at p. 60:

> "Where the disclosure of an informant's identity, or of the contents of his communication is relevant and helpful to the defense of an accused or is essential to a fair determination of the cause, the privilege must give way. Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases, the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication."

On this authority, Petitioner submits that specifics regarding this informant should have been forthcoming; if not the name, at least an accounting of the events which led the officer to conclude the informant was reliable. In the case at bar, the only specifics allowed was that the informant gave

reliable information at one time in 1968. The *Spinelli* case, cited above, required more information than that to justify the issuance of a search warrant on the confidential "tip". In this case, the Court precluded petitioner from making inquiry. It was petitioner who questioned the status of the informant. No offer of proof was made by the Commonwealth in this regard other than testimony that rose no higher than the affidavit in the *Spinelli* case.

Petitioner made inquiry because of grave doubt regarding the authenticity of the "tip". Evidence presented at the trial showed that Officer Isaacs had a search warrant in his pocket for "Snookie" Westcott's residence, which was never executed. Further the affidavit upon which *that* warrant was issued, was based on information given by *another* different informant. Petitioner theorized that the officers upon going to Westcott's residence to execute the search warrants, saw Hargraves enter the apartment, and it was then, for the first time, Hargraves was involved.

On this basis evidence regarding the Hargraves' informant was "relevant and helpful", and should have been allowed to allow cross-examination of Officer Isaacs regarding specifics of past reliable information.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted for the reason stated and further, because a decision in this case would provide guidance to courts regarding probable cause and arrest and searches without warrant. Further, it would provide guidance in State Court cases for the limits of inquiry regarding informers and their past performance.

Earlier decisions of this Court do not provide such guidelines.

Respectfully submitted,

s/ Stanley E. Sacks

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing petition was mailed, postage prepaid and by first-class mail, to Joseph H. Campbell, Commonwealth's Attorney for the City of Norfolk, Virginia, and Andrew P. Miller, Attorney General of Virginia, Supreme Court Library Building, Richmond, Virginia 23219.

s/ Stanley E. Sacks

STANLEY E. SACKS

APPENDIX A

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday *the* 19th *day of* January, 1970.

The petition of Melvin Willis Hargraves for a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Norfolk on the 27th day of August, 1969, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.

A Copy,
Teste:
Howard G. Turner, Clerk

By:
s/ *R. P. Towlivsan*
Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CORPORATION COURT OF THE CITY OF NORFOLK

COMMONWEALTH OF VIRGINIA,)
Plaintiff,)
V.)
MELVIN HARGRAVES,)
Defendant.)
)

MOTION TO SUPPRESS EVIDENCE

The defendant, Melvin Hargraves, moves the Court to suppress the following evidence and not to admit the same into evidence in this case on the ground that the same was improperly, unlawfully and illegally seized and obtained contrary to the Constitutions of the Commonwealth of Virginia and the United States of America and Statutes of the Commonwealth of Virginia, in such cases made and provided:

1. Any and all bags, papers or similar items taken from the defendant on June 27, 1968.

2. Any and all alleged narcotic substance taken from the defendant on June 27, 1968.

MELVIN HARGRAVES

By_____

Of Counsel

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